IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.M.JOSEPH

MONDAY, THE 26TH FEBRUARY 2007 / 7TH PHALGUNA 1928

WP(C).No. 456 of 2007(D)

PETITIONER:

MANAGER, I.I.V.U.P.SCHOOL,
MALIPPURAM, VYPIN, ERNAKULAM DISTRICT.

BY ADV. SRI.KRB.KAIMAL (SR.)
SRI.B.UNNIKRISHNA KAIMAL
SRI.V.MADHUSUDHANAN

RESPONDENTS:
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1. STATE OF KERALA REPRESENTED BY THE SECRETARY TO GOVERNMENT, GENERAL EDUCATION (L) DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.

2. THE DIRECTOR OF PUBLIC INSTRUCTIONS, THIRUVANANTHAPURAM.

3. DISTRICT EDUCATIONAL OFFICER, ERNAKULAM.

4. ASSISTANT EDUCATIONAL OFFICER, VYPIN, ERNAKULAM DISTRICT.

5. SMT.P.V.THANKAMANI, U.P.S.A, I.I.V.U.P.SCHOOL, MALIPPURAM, ERNAKULAM DISTRICT.

6. T.U.ABDUL KHADER, HEADMASTER, I.I.V.U.P.SHCOOL, MALIPPURAM, VYPIN, ERNAKULAM DISTRICT.

BY ADV. SRI.ESM.KABEER
G.P.SMT.M.R.SREELATHA

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 26/02/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

APPENDIX

PETITIONER'S EXHIBITS

EXT.P1	**TRUE COPY OF THE MINUTES OF THE COMBINED MEETING HELD ON 23-04-1967 AND THE MINUTES OF THE COMMITTEE MEETING HELD ON 27-4-1967 & 9-5-1967 TOGETHER.**
EXT.P2	**TRUE COPY OF THE MINUTES OF THE MEETING OF THE GENERAL BODY OF THE MALIPPURAM IKHAVUTHUL ISLAM SABHA HLED ON 22-10-1972**
EXT.P3	**TRUE COPY OF THE REGISTERED BYE-LAWS OF THE MALIPPURAM IKHAVUTHUL ISLAM SABHA**
EXT.P4	**TRUE COPY OF THE LETTER NO.56/04 DTD. 31-3-04 OF THE PETITIONER TO R4**
EXT.P5	**TRUE COPY OF THE ORDER NO.B.1529/04/K.DIS. DTD. 25-9-05 OF R4**
EXT.P6	**TRUE COPY OF THE ORDER NO.B.4/475/05/K.DIS. DTD.15-6-05 ISSUED BY R3**
EXT.P7	**TRUE COPY OF THE ORDER NO.B5/82791/05/DPI DTD. 17-6-05 ISSUED BY R2**
EXT.P8	**TRUE COPY OF THE REVISION PETITION DTD. 7-7-06 FILED BY THE PETITIONER BEFORE R1**

RESPONDENT'S EXHIBITS

EXT.R5(A)	**TRUE COPY OF THE DECISION REPORTED IN 2005(3)KLT 487**
EXT.R5(B)	**TRUE COPY OF THE JUDGMENT IN W.P.C.NO.2554/05**

/True Copy/

PA to Judge.

K.M.JOSEPH, J.

W.P.(C).No.456 OF 2007

Dated this the 26th day of February, 007

JUDGMENT

Petitioner challenges Exts.P5 to P7 and P10 orders. He seeks a direction to respondents 1 to 4 to recognise petitioner's school as established and managed by a religious minority entitled for the protection of Article 30(1) of the Constitution and a further direction to approve the appointment of the 6th respondent as Headmaster with effect from 01-04-2004.

Case of the petitioner in brief is as follows:

Petitioner is the manager of I.I.V.U.P. School, Malippuram. The school was established in the year 1934 by the Malippuram Ikhuvathul Islam Sabha in which members are all belonging to Muslim community. The Sabha was established in the year 1934. President of the Sabha elected from time to time, is the manager of the school. Sabha was not registered till the year 1972.

2. Ext.P1 is the minutes of the combined meeting of the outgoing and incoming managing committee held on 23-4-1967. Ext.P2 is the minutes of the meeting of the General Body held on 22-10-1972 which resolved to register the Sabha at the earliest. Ext.P3 is the registered Bye-laws of the Sabha. The school is governed by the provisions of the Kerala Education Act and Rules. According to the petitioner, the post of Headmaster is filled up by promoting teachers irrespective of their seniority, who are considered to be best suited for the school. The post of Headmaster became vacant on 31-03-2004 and 6th respondent was appointed. 6th respondent is having SSLC and TTC with test qualification. 5th respondent is a graduate with B.Ed and he is rank No.1 in the cadre of U.P.S.A.. Being a minority institution, the management decided to appoint the 6th respondent, who is also a member of the Muslim community. Ext.P4 is the letter seeking approval of appointment of the 6th respondent. 5th respondent filed petition claiming promotion on the basis of seniority and the

possession of B.Ed. By Ext.P5, 4th respondent declined approval stating reasons that the manager is not entitled to protection under Article 30(1) of the constitution and also that manager has failed to prove the minority status of the school. The third reason is that 5th respondent is senior to the 6th respondent and he is having graduate degree and B.Ed. Petitioner preferred appeal which was rejected by Ext.P6 order. Against Ext.P6 order, petitioner filed a revision petition. Ext.P7 is the order in revision. Petitioner filed Ext.P8 revision petition before the first respondent under Rule 92 of Chapter XIV A K.E.R. Ext.P9 is the certificate issued by the Tahsildar showing that school is running by the Sabha.

3. Heard counsel for the parties.

4. Learned counsel for the petitioner would submit that petitioner is entitled to protection under Article 30(1). He would submit that the reasons given in the impugned order that Sabha was registered after the establishment of the school is not a ground for denying the right under Article 30. The absence of status

declaration as minority by Government is another reason which is impugned. He referred to Exts.P1 and P2 to indicate that there was a Sabha. He would further submit that the minority institution is entitled to appoint any qualified person and it is for the minority institution to decide who is the person to get appointment. Referring to the decision of this court in **Prasad v. Philipose Mar Dilshus U.P.** School (2005(3) KLT 487), learned senior counsel Sri.K.R.B.Kaimal would submit that a perusal of Rule 44 and 45 would show that a person who is possessing TTC and SSLC could not be said to be not qualified and all that Rule 45 contemplates is a preference in favour of the graduates. In view of the fact that petitioner is entitled to enjoy minority rights, he would contend that petitioner is entitled to appoint a person who is junior provided that the person is qualified in terms of the provisions of Rule 45. Admittedly 6th respondent has SSLC and TTC and he is qualified under Rule 45(b), he submits and therefore there is nothing illegal in the appointment of the 6th respondent. Being

confronted with the decision of the Division Bench reported in 2005(2)KLT 487, learned senior counsel would contend that rule actually contemplates only preference and that the decision really does not lay down anything to the contrary. He would point out that the embargo against appointment of an under graduate teacher would no doubt apply in the normal case, but it may not be applicable in the case of minority institution.

5. Per contra, learned counsel for the respondent would contend that when there is a graduate teacher present, the manager has no choice even if it is a minority institution and the manager is duty bound to appoint the graduate teacher.

6. I would think that my decision on the question as to whether Rule 45 contemplates that when there is a graduate teacher it is only the graduate teacher who can be treated as qualified need alone be considered and answered in this writ petition. It is to be noted that in the Division Bench in 2005(3)KLT 487 the very same question arose. The Division Bench dealt with the case under

Article 30. The court held as follows:

> " However, we note that the right of the management in selecting headmaster is only from among the qualified persons. It is settled proposition that if qualified person is available, the minority rights protected under Art.30(1) of the Constitution will not enable the management to select unqualified persons in preference to qualified candidates. It was held in various Apex Court decisions that institutions run by minority are also bound by regulations fixing qualifications of teaching and methods to improve standards of education etc. Fixing higher qualification for headmaster is to ensure educational standard and excellence. The question is who is qualified amongst the contesting three candidates on 1-8-1994.
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> A reading of R.45 will clearly show that if there is a graduate teacher with B.Ed. qualification and he has got at least five years' experience in teaching after acquisition of B.Ed. degree, he should be appointed as headmaster provided he has got service equal to half of the period of service of the

senior most teacher. The appellant in W.A.1163 of 2002 was not he senior most teacher on the date of occurrence of the vacancy and he was also not having five years' teaching experience after obtaining B.Ed when the vacancy arose, that is, on 1-6-1964. The leave availed for study purposes from 1-6-1981 to 28-2-1993 cannot be taken a actual teaching experience. He was also on protection on 1-6-1994 when the vacancy arose. It was held in Mar Sleeba UPS v. State of Kerala (1990(1)KLT 626), that a protected teacher has no claim for the post of headmaster as he is not a member of the staff of that school during that time though he has a claim under R.51A. So, he was not qualified to be appointed as headmaster on the date of occurrence of the vacancy, that is, 1-6-1994. Therefore, there is no merit in that Writ Appeal.

Then the question is whether the second petitioner or fifth respondent is qualified to be appointed in that vacancy. Admittedly, second petitioner was not a graduate teacher. But the fifth respondent was a graduate teacher with 13 years' teaching experience. It is more than 50% teaching

experience of the second petitioner. This Court has held repeatedly that the word 'may' used in R.45 means 'shall' and if there is graduate teacher with five years' teaching experience and more than 50% service of senior most of non-graduate teacher, he should be appointed as headmaster. This is so held in Karunakaran v. DEO, Badagara, 1976 KLN 51, V.Abdul Rahiman, Manager, AMUPS, Poovambai v. AEO, Balussery & Ors., ILR 1976(2)Kerala 458, etc. and those decisions are repeatedly followed. Even though in Rev.Fr.Daniel v. Director of Public Instruction, 1965 KLT 927, it was held that minority schools are exempted from R.44 and R.45 is only a preferential right and minority management can appoint senior most qualified UPSA as headmaster notwithstanding availability of graduate teacher for promotion under R.45. But, after the above decision, R. 45 was substituted by new R.45 with effect from 9-11-1971. R. 44 and 45 should be read together. In Kunjappa v. State of Kerala 1992(2)KLT 87, it was held that if there is a graduate teacher with B.Ed. and required number of years of experience as mentioned in R.45, no teacher with SSLC and TTC alone could

be appointed as headmaster. In the above circumstances, only fifth respondent was entitled to be appointed in the vacancy that arose on 1-6-1994."

7. In 1992(2)KLT 87 learned Single Judge of this court had to deal with the constitutional validity of Rule 45 of Chapter XIV A of K.E.R. Learned Single Judge inter-alia held as follows:

" A Division Bench of this Court had occasion to consider the preference granted to certain persons having the qualification of graduation with B.Ed. for appointment to the post of Headmaster in U.P. School under R.45 of Ch.XIV-A of K.E.R. in a different context in W.A.Nos. 399 and 444 of 1974. This Court held that R.45 prescribes the qualification for appointment of Headmaster of U.P.School and if there is a graduate teacher with B.Ed. and he has the required years of experience, no teacher with S.S.L.C. or equivalent and T.C.C. could be appointed as Headmaster. In view of the wording of R.45, I do not find any merit in the contention raised by the petitioners that the qualification of S.S.L.C. and T.T.C. is mandatory

for appointment to the post of Headmaster in U.P.School."

8. In such circumstances, I am of the view that when there is a teacher who is graduate and who is otherwise qualified, it may not be open even to the minority institution to appoint an under graduate teacher. That appears to be the principle enunciated in 2005(3)KLT 487. I respectfully follow the said judgment. Petitioner is duty bound to appoint the 5th respondent.

In such circumstances, I feel that the writ petition is liable to be dismissed. I make it clear that I leave open the challenge in regard to finding that petitioner is not entitled to protection under Article 30(1). Accordingly, subject to leaving open the challenge of the petitioner to the finding that petitioner is not entitled to invoke Article 30, the writ petition shall stand dismissed.

K.M.JOSEPH
JUDGE

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